Supreme Court, U.S.
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(3)

NO. 03-948

In The

Supreme Court of the United States

MICHELLE SMITH,

Petitioner,

v.

NORMA ALICE JONES, ACTING IN HER CAPACITY AS PRESIDENT, AND GAYNELL L. PITTMAN, ACTING IN HER CAPACITY AS TREASURER OF THE MAUK-CHARING NORWICH COMMUNITY CLUB, AN UNINCORPORATED ASSOCIATION OF NATURAL PERSONS RESIDING IN THE STATE OF GEORGIA, COUNTY OF TAYLOR,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. The following three (3) questions are raised by Petitioner:

1. Does a direct conflict exist between the 11th Circuit Court of Appeals' arbitrary dismissal of a case as frivolous and the U.S. Supreme Court's holding in *Barefoot v. Estelle*, 463 U.S. 880 (1983) when the issue before the 11th Circuit of whether section 1985 (3) of 42 U.S.C. §1985 (3) classifies as an equal rights statute for the purpose of removal has not been squarely foreclosed by authoritative court decision because the issue before the 11th Circuit was one of first impression?

2. Does a direct conflict exist between the 11th Circuit Court of Appeals' holding that an arbitrary dismissal of a removed civil rights case to federal court is frivolous for lack of evidence on appeal when the District Court failed to require or allow an evidentiary hearing, in conflict with *U.S. v. Rachel*, 384 U.S. 780 (1966)?

3. Does a direct conflict exist between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand?

B. In order to reach these questions, the Court would first need to answer the following questions:

1. With respect to Petitioner's first question and in light of the facts of this case, is it necessary to even determine whether 42 U.S.C. §1985(3) is an "equal civil rights" statute?

2. With respect to Petitioner's second question, did the District Court hold a hearing with regard to remand of the Petitioner's removed action?

3. With respect to Petitioner's third question, does the Court even have jurisdiction to consider a non-final judgment of a District Court's setting aside a Clerk's entry of default with regard to the Petitioner's counterclaim?

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STATEMENT OF THE CASE

The instant case was begun by the filing on July 3, 2002, in the Superior Court of Taylor County, Georgia, of a complaint by Norma Alice Jones and others in their capacities as officers of an unincorporated association known as the MCN Club (hereinafter "MCN Club") against Bonnie Michelle Smith (hereinafter "Smith") to quiet title to certain real estate located in Taylor County, Georgia. After being served with the complaint, Smith filed a petition to remove the action to the U.S. District Court for the Middle District of Georgia. Smith's alleged removal was predicated on four separate grounds, only one of which is relevant to the Petition for Writ of Certiorari, that being removal under 28 U.S.C. §1443.

In the pleadings filed at the time of the removal, Smith interposed a counterclaim. When the counterclaim remained unanswered for twenty (20) days, Smith requested and obtained a Clerk's Entry of Default.

After a hearing on multiple motions, U.S. District Court Judge Clay D. Land remanded the case to the Superior Court of Taylor County, relieved the MCN Club of the Clerk's Entry of Default and denied Smith's motion for a default judgment. Smith appealed to the U.S. Court of Appeals for the Eleventh Circuit.

On December 18, 2002, in a memorandum to counsel for both parties, the Clerk of the U.S. Court of Appeals for the Eleventh Circuit requested the parties to simultaneously advise the Court in writing with regard to the following jurisdictional question: "Whether the district court's November 15, 2002, order that: (1) granted the plaintiffs' motion to remand; (2) denied the plaintiffs' motion for costs, and (3) granted the plaintiffs' motion to set aside the clerk's entry of default is reviewable? (Cits. omitted)."

After receiving responses from counsel, the Court entered an order stating that Smith could proceed in part, specifically with regard to whether her "...civil rights were implicated and Federal officers were

named in the suit." The Court specifically found it lacked jurisdiction over the denial of Smith's motion for default judgment since such motion was not a final and appealable order.

The U.S. Court of Appeals for the Eleventh Circuit subsequently dismissed Smith's appeal as being frivolous on July 3, 2003. On August 6, 2003, the U.S. Court of Appeals for the Eleventh Circuit denied Smith's motion for reconsideration.

In the meanwhile, a motion for summary judgment was filed by the MCN Club in the Superior Court of Taylor County, Georgia, requesting that court to find that, under Georgia law, title to the real property in question was properly vested in the MCN Club. Smith filed a cross motion to dismiss the underlying action. The Superior Court of Taylor County entered two orders on the 17th day of February, 2004: one granted summary judgment in favor of the MCN Club, and a second order denied Smith's motion to dismiss.[1] (See Appendix, pages A-1 through A-7 and A-8 through A-11)

STATEMENT OF FACTS

Respondents Norma Alice Jones and Gaynell L. Pittman, acting in the respective capacities of President and Treasurer of an unincorporated association known as the Mauk-Charing-Norwich Community Club, claimed title to a piece of real estate in Taylor County, Georgia, known as the Old Mauk Schoolhouse. Smith also claimed title to the same property. The MCN Club maintained that the property had been deeded to the club in December of 1970; however, Smith, received a deed from the Taylor County School Board in May of 2002, which purported to deed the same property to her. A lawsuit

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1 The Superior Court of Taylor County issued an order granting summary judgment in accordance with the provisions of O.C.G.A. §9-11-56. As stated in O.C.G.A §9-11-56 9(h), an order granting summary judgment is subject to review by appeal. Such appeals, as stated in O.C.G.A. §5-6-34, may be taken to the Supreme Court of Georgia and the Court of Appeals of Georgia, subject to the appellate jurisdiction of each particular court.

was filed by the MCN Club under applicable Georgia law to determine title to the real property in question.

In addition to the above brief statement of facts, the MCN Club feels obligated to take issue with the statement produced by Smith. First and foremost, this case has absolutely nothing to do with civil rights. It has only to do with title to real estate in Taylor County, Georgia. While Smith may indeed be a new attorney who represents blacks and other minorities, the allegations she makes with regard to harassment and the burning of her family's home have never been substantiated. No competent evidence in that regard has ever been produced, at least not in to the hearing held in the U.S. District Court for the Middle District of Georgia on November 12, 2003.

The fraudulent deed argument made by Smith has been found false by the Superior Court of Taylor County, Georgia, which entered an order granting summary judgment to the MCN Club on their original and remanded title action. See Appendix, pages A-1 through A-7.

Although Smith continues to allege there is some racial bias involved in this case, no proof of any racial bias has ever been offered. Additionally, for what it is worth, Smith is white. More importantly, however, racial bias has never been a ground for removal of a case from a state court to the federal judicial system.

REASONS FOR DENYING THE WRIT

Before discussing the questions posed by Smith in her Petition for Writ of Certiorari, the MCN Club cannot help but suggest to the Court that this case simply does not meet any of the criteria set forth in Rule 10 of the Rules of the Supreme Court of the United States regarding considerations governing review on certiorari. There are no conflicting court of appeals decisions, conflicts with state courts of last resort or departures from accepted and usual courses of judicial proceedings which call for the exercise of this Court's supervisory power. No federal question has been decided by a state court of last resort. And no questions of federal law have been decided in any manner that conflicts

with prior cases decided by this Court. The case simply is not worthy of review by this Court. Further, as previously stated, the case has already proceeded to a final judgment in the state court.

Nonetheless, the MCN Club feels compelled to respond to Smith's questions presented for review.

I. The U.S. Court of Appeals for the Eleventh Circuit dismissed the Smith's appeal as being frivolous because it was frivolous.

Smith's first question assumes that her case was dismissed as being frivolous because the U.S. Court of Appeals for the Eleventh Circuit refused to determine whether 42 U.S.C. §1985(3) is an "equal civil rights" statute for purposes of removal. By the way her question is phrased, it is hard to determine if she argues that the case should not have been dismissed at all, or that it simply should not have been dismissed as being frivolous.

The reason that Smith's appeal to the U.S. Court of Appeals to the Eleventh Circuit was frivolous was quite simply for the reason that the case is squarely controlled by *Georgia v. Rachel*, 384 U.S. 780 (1966), as applied in *Alabama v. Conley*, 245 F. 3d 1292 (11th Cir. 2001).

In *Georgia v. Rachel*, *supra*, this Court set forth a two pronged test ("the *Rachel* test") for removal under 28 U.S.C. §1443 (1). Under the *Rachel* test, the removing defendant must show "both that the right upon which they rely is 'a right under any law providing for ...equal civil rights' and that they are 'denied or cannot enforce' that right" in state court. Id.

In *Alabama v. Conley*, *supra*, the U.S. Court of Appeals for the Eleventh Circuit considered an eminent domain action filed in state court wherein the State of Alabama sought to condemn parcels of land owned by the defendant. The defendant removed the case to federal court. The District Court granted the plaintiff's motion to remand and was affirmed by the U.S. Court of Appeals for the Eleventh Circuit.

In *Alabama v. Conley, supra*, the U.S. Court of Appeals assumed that 42 U.S.C. §1985(3) met the first prong of the *Rachel* test, but concluded that the statute did not contain any specific provision insulating defendant from a state's facially neutral eminent domain proceedings. The Court considered the exception to this rule, that being whether the very act of being a state court proceeding constituted a denial of rights conferred by federal statute.

Specifically, the U.S. Court of Appeals for the Eleventh Circuit found that, unlike the Civil Rights Act of 1964 which was at issue in *Rachel*, and which provided a specific right to trespass when making a peaceful effort to obtain service on an equal basis in restaurants and other establishments covered by the Act, no explicit prohibitions against proceedings in state courts based on the defendant's actions in state eminent domain proceedings was provided for in 42 U.S.C.§1985(3). There was simply no conflict between state eminent domain law and 42 U.S.C. §1985(3).

As set forth by Judge Land in his original opinion, it matters not whether 42 U.S.C. §1985(3) is an "equal civil rights" statute for the reason that under *Alabama v. Conley, supra*, Smith cannot satisfy the second prong of the *Rachel* test.

If this Court still holds to the definition set forth in *Barefoot v. Estelle*, 463 U.S. 80 (1983) indicating a case is frivolous if it is "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case," then there is no question whatsoever that Smith's appeals in the U.S. Court of Appeals for the Eleventh Circuit were indeed frivolous.

Quite simply, *Alabama v. Conley, supra*, and the instant case are so strikingly similar, it is difficult to imagine a member of the bar not being able to readily conclude that an appeal of the District Court's order in the instant case would be anything other than frivolous under any definition of that term.

II. In order to reach Smith's second question, it must be erroneously assumed that no evidentiary hearing was held in the District Court.

It is specifically set forth in the order of U.S. District Court that a hearing was held on November 12, 2002. Either Smith is directly contradicting the District Court Judge by saying that no hearing was ever held, or she evidences such a complete lack of understanding of the rules of procedure that she does not realize that the opportunity to present evidence was afforded her, and that she was simply unprepared. The assertion that no hearing was held is simply false. The assertion that no opportunity to present evidence was given is equally false.

Since by agreement of counsel, no transcript of the proceedings was made, counsel for the MCN Club must rely on his own memory of the event. To the best of this counsel's memory, Smith called no witnesses. Smith did make long and impassioned argument before the Hon. Clay D. Land, Judge of the U.S. District Court for the Middle District of Georgia, and restated many of the allegations made in her complaint. Though counsel for the MCN Club does not remember Smith actually being sworn, it is common in the courts of State of Georgia for that which a member of the bar states in his or her place to be considered as if an oath had been taken. Any objective reading of the order entered by Judge Land would certainly show that he gave Smith the benefit of the doubt with regard to her allegations and statements made in the hearing.

And, contrary to Smith's contention, she did actually offer some admissible evidence in the District Court by affidavit. The record of the proceedings in the U.S. District Court for the Middle District of Georgia contains two affidavits, one of Smith herself and the other of one Cassandra Brown. It must be assumed that the U.S. District Judge reviewed these affidavits which were attached to the Smith's response to MCN Club's motion for remand.

III. The order relieving the MCN Club from default for failure to answer Smith's counter claim is a non-final order not subject to appeal.

In order to reach the Smith's third question, this court would have to determine it has jurisdiction over the denial of Smith's motion for a default judgment, a non-final order. The Court of Appeals decided under *Massachusetts Casualty Insurance Company v. Foreman*, 469 F.2d 259, 260 (5th Cir. 1972) (per curium) that it had no such jurisdiction. That Court was correct.

CONCLUSION

The ultimate question presented in the underlying lawsuit is who owns the Old Mauk Schoolhouse in Taylor County, Georgia. Such a question is not one for the federal courts. It is exclusively a state law question with no federal overtones. The original removal was appropriately remanded by the U.S. District Court Judge. The errors of which Smith's complained on appeal to the U.S. Court of Appeals for the Eleventh Circuit were indeed frivolous and the Court so recognized. The grounds for Smith's Petition for Writ of Certiorari are equally frivolous, and the writ should be denied.

Respectfully submitted,
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APPENDIX

IN THE SUPERIOR COURT OF TAYLOR COUNTY
STATE OF GEORGIA

NORMA ALICE JONES, acting in her capacity as President, and Gaynell L. Pittman, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, Plaintiff,	:	Case No. 02-CV-132
vs.	:	
MICHELLE SMITH and TAYLOR COUNTY BOARD OF EDUCATION , Defendants.	:	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court, having considered the Pleadings, depositions and attached exhibits,[1] Plaintiffs' Motion for Summary Judgment and Brief, Defendant's Response and Brief, and Oral Arguments makes the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact and Conclusions of Law

The Plaintiffs, Norma Alice Jones and Gaynell L. Pitmann (sic), in their official capacity as officers of the Mauk-Charing-Norwich Community Club (herein Plaintiffs or MCN Club) filed this action in

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1 Defendant Smith's deposition was given to the Court before she had signed the deposition. The Court received the deposition and the accompanying exhibits as discovery documents with the understanding that Defendant Smith would submit an errata sheet listing any of her objections to its form.

Taylor County Superior Court on July 3, 2002 against Michelle Smith and the Taylor County Board of Education. Before filing an answer in the Taylor County Superior Court, Defendant Michelle Smith removed the case to Federal District Court, Middle District of Georgia. After finding the case was improperly removed, the Federal District Court remanded the case to the Taylor County Superior Court. On May 20, 2003, Defendant Smith filed an Amended Answer and Counterclaim. On December 30, 2003, the Plaintiffs filed a Motion for Summary Judgment and supporting brief with the Taylor County Superior Court. Defendant Smith filed a response to the Plaintiff's Motion for Summary Judgment on February 3, 2004. The Court conducted a hearing on February 5, 2004, where both parties were given an opportunity to present their arguments regarding the Plaintiff's Motion for Summary Judgment.

The law regarding summary judgments is codified in the Official Code of Georgia § 9-11-56. The law provides that if after viewing the evidence in a light most favorable to the non-moving party, here Defendant Smith, there is no genuine issue of material fact, and the Plaintiffs are entitled to a judgment as a matter of law, the motion should be granted and the judgment sought should be entered. On the other hand, if there remain substantial issues of fact, a party cannot be denied a trial by jury and the motion cannot be granted.

The Plaintiffs' Motion for Summary Judgment requests judgment on all the issues pending in this case. The Plaintiffs argue that there are no issues of material fact concerning the ownership of the Mauk Schoolhouse property, and that Defendant Smith has failed to provide sufficient evidence to withstand summary judgment on both her RICO and defamation counterclaims. The Taylor County Board of Education filed no objection to the Plaintiffs' Motion for Summary Judgment.

The first issue for determination by the Court is who is the record title owner of the Mauk Schoolhouse property. The parties have entered into evidence four separate deeds concerning the contested property. The first deed in evidence is a 1936 deed conveying the property to the Taylor County Board of Education; the second deed is a 1956 deed conveying the property from the Taylor County Board of Education

to the Plaintiff and creating a reversionary interest in the grantor; the third deed is a 1970 quitclaim deed conveying the remaining reversionary interest in the property to the Plaintiff; and the fourth deed is a 2002 quitclaim deed conveying the Taylor County Board of Education's interest to Defendant Smith.

The 1956 deed includes the following language: "The Taylor County Board of Education executes this indenture with the provision being in the event the Mauk-Charing-Norwich Community Club should cease to exist or in the event that said club should fail to hold regularly organized community club meetings for a continuous period of three years, ownership shall revert to the Taylor County Board of Education.[2]

The 1970 quitclaim deed conveyed from the Taylor County Board of Education to the Plaintiff "all right, title and interest in the Taylor County Board of Education." The language of the deed further clarifies its purpose is to convey the Taylor County Board of Education's reversionary interest to the Plaintiffs, so as to create full fee simple title in Plaintiff. The Plaintiffs also introduced uncontested evidence of the minutes taken at a Taylor County Board of Education meeting in late 1970 discussing the quitclaim deed and resolving to convey their reversionary interest in the Mauk Schoolhouse property to the MCN Club.

Defendant Smith argues that the 1970 deed is a fraud. However, she presents no evidence to overcome the presumption that a properly filed deed is presumed valid. Defendant Smith's only evidence is her own testimony that an anonymous caller telephoned her on the date the lawsuit was filed and told her that the Plaintiffs had manufactured

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2 A later paragraph in the 1956 deed states that the Plaintiffs will "have and to hold said bargaining premises under grantee and grantee's heirs and assigns together with all and singular rights, members and appurtenances there to the same, and any manner belonging to the owned property use and benefit and behoove the grantee and grantee's heir and heir assigns in fee simple." According to the cannons of constructions, when interpreting a deed, limiting language that is followed by a subsequent grant in fee simple voids the limitation language. Although neither party has presented this argument to the Court, the Court does not rule on it. However, the court does take this fact into consideration when making its decision.

a deed. However, aside from her self-serving statement, Defendant Smith failed to present any evidence to rebut the accuracy of the 1970 School Board minutes relating to the proposal and sale, and the numbered indexes and deed records placing the 1970 deed in correct chronological order. The Defendant Smith presented no evidence that the signatures on the deed were forged. In short, she presents no evidence that the recorded deeds should not be accepted as true and correct documents.

The Court finds that without a question of material fact concerning the 1970 deed, record legal title was in the Plaintiffs at the time the Taylor County Board of Education signed the 2002 deed conveying property to Defendant Smith. Because the Taylor county Board of education retained no property interest over the Mauk Schoolhouse at the time of the 2002 conveyance, they could convey no interest to the Defendant Smith The Court finds that there is no issue material fact for which a jury would need to decide concerning the ownership of the Mauk Schoolhouse property; therefore, the Plaintiffs are entitled to summary judgment as a matter of law on the title issue.

The second issue for determination is the Defendant Smith's counterclaim that alleges the Plaintiffs committed violations of the Georgia RICO Act codified in O.C.G.A. § 16-14-9. The law provides that an individual can bring a civil action against the members of an entity that has committed two predicate acts in violation of the statute. Defendant Smith alleges that the Plaintiffs committed burglary, arson and conspiracy as statutory –sanctioned predicate acts.[3] However, because she has provided insufficient evidence beyond her allegations, that create issues of material fact, Defendant Smith's claims cannot withstand summary judgment.

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3 In her counterclaim, Defendant Smith also alleges criminal trespass, mail fraud, criminal damage to property and stalking as racketeering activities. However, because these crimes are not listed as predicate acts in O.C.G.A. §16-14-3 of Georgia's RICO Act, they cannot be used to support her claim and are therefore inconsequential to the determination of the pending motion.

In support of her arson claim, Defendant Smith submitted an affidavit of Robert Drew, an expert in arson investigation, who investigated the fire which destroyed a home owned by a family corporation. Defendant Smith had no present ownership interest in the home or the family corporation. His affidavit implicates a member of the MCN Club, who is also a relative of the Defendant Smith, but does not state what facts the expert based his conclusion upon or how he came to those conclusions. No evidence was presented showing any perpetrators of the arson had been formally charged, indicted or convicted. Without a factual basis for his conclusion, Defendant Smith's expert witness statements are conclusory and are not sufficient to withstand Plaintiff's motion.

The Defendant also failed to provide the Court with any evidence proving a nexus between the Plaintiffs and the alleged crimes. The expert's affidavit that implicates a member of the MCN Club is too tenuous a connection to create material issues for jury determination.

Defendant Smith's contention that the Plaintiffs committed burglary as a predicate act to a civil RICO claim, must fail. Even if Plaintiff's club members broke into the Mauk Schoolhouse between June 20 and 25, 2002, and took items from inside, they could not have committed burglary. The Court has already determined in the Motion to Dismiss Order that the Plaintiffs were the rightful owners of the Mauk Schoolhouse at the time of the alleged burglary. No evidence was presented that the Plaintiffs had been charged, indicted, or convicted of the burglary. The Plaintiffs cannot be charged with committing a burglary on their own property. Therefore, the alleged predicate act of burglary cannot be used as the basis for a RICO action.

Defendant Smith presented no evidence of violation of any other predicate act even those predicate acts incorporated from the Federal RICO statute into the Georgia RICO statute.

Furthermore, Defendant Smith presented no evidence in support of her allegations of conspiracy between any perpetrators of any alleged predicate acts and any of the club members. For the foregoing reasons,

the Court finds there are no material facts for a jury to decide concerning Defendant's Smith's RICO allegation and Plaintiffs are entitled to summary judgment as to the RICO counterclaim as a matter of law.

The remaining issue concerns the Defendant Smith's defamation counterclaim. The counterclaim alleges that Norma Alice Jones made a slanderous statement on May 14, 2002 at a MNC Club meeting. The defamatory remarks allegedly stated that Defendant Smith stole the Mauk Schoolhouse property, misrepresented herself, was of poor moral character and lied about key federal statutes.[4] Defendant Smith's mother, Bonnie Harbuck, through an affidavit, offered the only evidence in support of the alleged defamation. The affidavit did not include specific details as to what was said by Ms. Jones, but merely stated that she heard defamatory statements made by Ms. Jones at the MCN Club meeting. The Court finds that because Ms. Harbuck's affidavit does not provide any factual basis for her conclusion, her statement is conclusory and is not sufficient evidence to survive Plaintiff's Motion for Summary Judgment. Defendant Smith offered no evidence that the Plaintiffs published libelous statements in support of her counterclaim.

Furthermore, the defamation claim was alleged against Ms. Jones as an individual, not in her official capacity as President of the MCN Club. Ms. Jones is only a party to the lawsuit as President of the MCN Club, and because Ms. Jones was not joined individually as a party to the suit, Defendant Smith's claim against her as an individual must fail. The Court finds that there are no issues of material fact that remain for jury determination regarding Defendant Smith's defamation counterclaim, and therefore the Plaintiffs are entitled to summary judgment as a matter of law.

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4 In her deposition, Defendant Smith admitted that someone could reasonably interpret her actions in the way Alice Norma Jones did at the MNC Club meeting.

ORDER

For the above-stated reasons, the Plaintiff's Motion for Summary Judgment is GRANTED as to all issues.

SO ORDERED this the 17th day of February, 2004.

/s/ Frank J. Jordan, Jr.
Judge of Superior Court
Chattahoochee Judicial District

IN THE SUPERIOR COURT OF TAYLOR COUNTY
STATE OF GEORGIA

NORMA ALICE JONES, acting in her capacity as President, and Gaynell L. Pittman, acting in her capacity as Treasurer, of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, Plaintiff,	:	Case No. 02-CV -132
vs.	:	
MICHELLE SMITH and TAYLOR COUNTY BOARD OF EDUCATION , Defendants.	:	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The Court, having considered the Pleadings, Defendant's Motion to Dismiss, Plaintiffs' Response to Defendant's Motion to Dismiss, Defendant's Reply to Plaintiffs' Response to Defendant's Motion to Dismiss and after having a hearing on February 5, 2004, makes the following Conclusions of Law and Order:

The Plaintiffs, Norma Alice Jones and Gaynell L. Pitmann (sic), in their official capacity as officers of the Mauk-Charing-Norwich Community Club (herein Plaintiffs or MCN Club) filed this action in Taylor County Superior Court on July 3, 2002. Before filing an answer in the Taylor County Superior Court, Defendant Michelle Smith removed the case to Federal District Court, Middle District of Georgia. After finding the case was improperly removed, the District Court remanded the case to the Taylor County Superior Court. On May 20, 2003, Defendant Smith filed an Amended Answer and Counterclaim. On December 31, 2003, Defendant Smith filed a Motion to Dismiss and supporting brief with the Taylor County Superior Court. On January 7, 2004, the Plaintiffs filed their Response to Defendant's Motion to

Dismiss. Defendant Smith filed a Reply to Plaintiff's Response to Defendant's Motion to Dismiss on February 3, 2004. The Court held a hearing on February 5, 2004, where both patties were given an opportunity to present their arguments regarding the Motion to Dismiss.

In her Motion to Dismiss, Defendant Smith presents four arguments why the Plaintiffs' claim should be dismissed with prejudice. Specifically, Defendant Smith argues 1) the Plaintiffs failed to state a claim upon which relief can be granted; 2) the Plaintiffs' pleadings were defective to bring an action under Quiet Title Act; 3) the Plaintiffs lacked standing to bring the action; and 4) Plaintiffs' attorney, Lovick Anthony, has a conflict of interest that so taints the proceeding that the case must be dismissed.

Defendant Smith's first argument is that the Plaintiffs failed to state a claim for which relief can be granted. The Georgia Supreme Court in *Bourn v. Herring*, 225 Ga. 67, 70 (1969), states "[a] motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any statement: of facts which could be proved in support of his claim. If within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient." In this case. the Plaintiffs frame their complaint as a request for declaratory judgment.

The Georgia Civil Practice Act specifically authorizes declaratory judgments in Official Code of Georgia, Annotated, Section 9-4-2(a), which states: "In cases of actual controversy, the respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed; and the declaration shall have the force and effect of a final judgment and be reviewable as such." The legislature further authorized declaratory judgment in "any civil case in which it appears to the court that the declaration should be made." In Section 9-4-2(c), the law states "Relief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other legal or equitable remedy."

Defendant Smith argues that despite the seemingly broad language of the declaratory judgment law, the Georgia Supreme Court limited its applicability in land title disputes in the case *Porter, et al.. v. Houghton*, 273 Ga. 407 (2001). In *Porter*, the Court held that the declaratory judgment was the inappropriate form of relief for a plaintiff seeking to establish that the siblings of his deceased wife had no interest in lands that were allegedly owned by the deceased at the time of her death. The Court held that the appropriate remedy would have been through the Georgia Quiet Title Act.

The case at bar, however, is substantially different from the *Porter* case. In *Porter*, the Court based its decision on the fact that the plaintiff failed to show that the declaratory judgment was necessary to relieve him of risk of taking some future action that without direction would jeopardize his interest. In the present case, the Plaintiff has sufficiently shown that failing to resolve the controversy created by the Defendant Smith's claim of ownership of the Mauk Schoolhouse, would put the Plaintiff at risk of both civil and criminal penalties related to reentry of the property in question.

The Court in *Porter* also stated that cases like the one before it that involve "record title to numerous tracts of land and multiple parties, declaratory relief will seldom, if ever, be available." The case at bar presents only two competing claims of ownership of a single property. The decision of the Court in *Porter* does not stand for the broad proposition that Defendant Smith asserts, that is, declaratory judgment is an inappropriate remedy for any case that could have been brought simultaneously under the Quiet Title Act. This Court finds the case law exemplified by the *J.M. Huber Corporation v. Georgia Marble Company*, 239 Ga. App. 271 (1999), to be more persuasive, which states "disputes concerning ownership of or right of access to land are classic candidates for resolution for declaratory judgment."

Defendant Smith's second argument assumes, *arguendo*, that because declaratory judgment is an inappropriate remedy in the case at bar, the Plaintiffs' only available remedy is though the Georgia Quiet Title Act. Because this court does not so hold, the failure of the Plaintiffs' action to meet the requirements of the Quiet Title Act are inconsequential. The Plaintiffs chose to bring the action as one for declaratory judgment,

and this Court finds that their prayer for relief is proper, so the court need not address this question.

The Defendant's third argument alleges that the Plaintiffs lack standing to bring the action. Citing In *Re Rivermist Homeowners Association, Inc.*, 244 Ga. 515 (1979), Defendant Smith argues that to withstand a motion to dismiss, the Plaintiffs must assert a claim of either current record title or current prescriptive title. The Plaintiffs brought suit to determine rightful use and possession of the property based on the recorded deeds in the Taylor County Courthouse, which would clearly be a claim of record title. There is undisputed evidence in the record that by a 1956 deed, the Taylor County Board of Education conveyed the Plaintiffs a property interest in the Mauk Schoolhouse. While the Defendant Taylor County Board of Education placed conditions upon the Plaintiffs' ownership in that deed, there is no argument that the Plaintiffs were not conveyed an interest in the property. A second deed in 1970 from the Board of Education to the Plaintiffs conveys "all right, title, and interest" in the Mauk Schoolhouse property. Because the Plaintiffs clearly have a property interest in the Mauk Schoolhouse, there are sufficient grounds to grant them standing in the present action.

Defendant Smith's final argument is that the Plaintiffs' attorney has a conflict of interest and as a result the case should be dismissed. The appropriate remedy for a situation where a party's counsel has a conflict of interest with an opposing party is to seek removal of the conflicted lawyer, not to dismiss the case. Defendant presented no evidence as to any conflict. Because the remedy that Defendant Smith's seeks is inappropriate, the Court does not need to further rule on the validity of her arguments.

For the above-stated reasons, Defendant Smith's Motion to Dismiss is hereby DENIED.

SO ORDERED this the 17th day of February. 2004.

/s/Frank J. Jordan, Jr.
Judge of Superior Court
Chattahoochee Judicial District